Editor's note: Appealed – aff'd, Civ. No. 75-750 (D.N.M. Feb. 28, 1977), aff'd, No. 77-1446 (10th Cir. Nov. 16, 1977)

UNITED STATES
v.
CATHERINE R. BLYTHE

IBLA 70-78 Decided June 28, 1974

Appeal from decision of Office of Appeals and Hearings, Bureau of Land Management, affirming Hearing Examiner Paul A. Shepard's decision, NM 244, declaring mining claim null and void.

Affirmed as modified.

Mining Claims: Contests--Words and Phrases

"Community property." Under the law of New Mexico, when an interest in a mining claim is acquired by a husband and wife by a deed in which they are so designated, there is a presumption that such interest is community property.

Mining Claims: Contests -- Rules of Practice: Government Contests -- Words and Phrases

"Community property." Where the Government contests an unpatented mining claim held as community property, only the naming of the husband is essential to the notice of contest and complaint and the interest of the wife is determined just as if she had been expressly made a party.

Mining Claims: Contests -- Res Judicata -- Rules of Practice: Appeals: Generally

Where an appeal has been taken and a final Departmental decision has been reached as to validity of a mining claim held as community property, under the doctrine of administrative finality the principle of res judicata will operate to bar consideration of a new appeal arising from a

later proceeding involving the same issues in connection with the community property interest of the wife, absent compelling legal or equitable reasons for reconsideration.

APPEARANCES: Catherine R. Blythe, pro se.

OPINION BY ADMINISTRATIVE JUDGE GOSS

Catherine R. Blythe has appealed from a decision of the Office of Appeals and Hearings, Bureau of Land Management, issued July 9, 1969, affirming a Hearing Examiner decision of April 9, 1969, declaring her Cougar lode mining claim null and void for the lack of a discovery of a valuable mineral deposit within the meaning of the United States mining laws.

The claim, situated in the Lincoln National Forest, Lincoln County, New Mexico, was located in 1948 by Eddie Fitzpatrick and Judge Dee C. Blythe, appellant's husband. Fitzpatrick and his wife conveyed their undivided one-half interest in the unpatented claim to Buck Ellison and his wife, who in turn quitclaimed their undivided one-half interest to "Dee C. Blythe and Catherine R. Blythe, husband and wife," by a deed dated May 20, 1960. 1/

On May 3, 1963, the Government issued a complaint against Dee C. Blythe in Contest No. NM 141, charging that the claim was void for want of discovery. Judge Blythe admitted ownership of the claim, but denied the charge of no discovery. After hearing, a decision was rendered holding the Cougar null and void for lack of discovery. This was ultimately affirmed by the Department in its decision, United States v. Blythe, A-30670 (February 21, 1967). At no time was inquiry directed to the interest, if any, of the wife of Dee C. Blythe, except that the contest complaint referred to the deed from the Ellisons.

On December 11, 1967, the Government initiated the action herein concerned, Contest No. NM 244, by issuing a complaint against Catherine R. Blythe as sole contestee. The claim, land description and charges in the complaint were the same as in Contest No. 141 except for the dates of the complaints. Appellant admitted ownership of the claim but denied lack of discovery.

1/ The July 9, 1969, decision of the Office of Appeals and Hearings states that the interest was conveyed on May 20, 1964, but a copy of the deed verifies that the correct date is May 20, 1960.

At the hearing in Contest No. 244 appellant was represented by her husband, Judge Blythe. At no time did appellant assert he was "a necessary and indispensable party" to the proceeding. By decision of April 9, 1969, the claim was invalidated for lack of discovery. The Office of Appeals and Hearings, Bureau of Land Management, affirmed the finding of invalidity on July 9, 1969, holding that because all of Judge Blythe's rights had been invalidated in Contest No. 141, he was not a necessary party in Contest
No. 244. 2/

The assertions on appeal are identical to those made before the Director, BLM. Besides a number of allegations as to the existence of a discovery and as to errors in connection with the hearing, appellant contends that the Department is without jurisdiction because of failure to join her husband as a party. Appellant alleges that Judge Blythe held the Cougar as community property, and that even after the invalidating of his interest in Contest No. 141, he is "a necessary and indispensable party" to Contest No. 244, an action involving community property in New Mexico.

There is no merit to appellant's arguments. 3/ Appellant states that the claim is community property, which statement is in accordance with the New Mexico presumption as to conveyances made to parties described as "husband and wife." 4/ In United States

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2/ Footnote 1 of the Office of Appeals and Hearings decision states: "The record does not reveal why Catherine R. Blythe was not joined as a contestee in Contest 141, but, presumably, the failure to join her in that proceeding was due to an inadvertence."

3/ While not in effect at the time of the hearing, Departmental regulation 43 CFR 4.451-2 provides in part:

"§ 4.451-2 Proceedings in Government contests.

The proceedings in Government contests shall be governed by the rules relating to proceedings in private contests with the following exceptions:

* * * * * * *

(b) A government contest complaint will not be insufficient and subject to dismissal for failure to name all parties interested, or for failure to serve every party who has been named. * * *"

4/ The interest of appellant passed to her by an instrument in which she and her husband are described as "husband and wife." Section 57-4-1 of New Mexico Statutes Annotated (1953) provides as follows:

"Community property--Source--Presumptions. --All other real and personal property acquired after marriage by either husband or wife, or both, is community property; but whenever any real or personal property, or any interest therein or encumbrance thereon is acquired (cont. next page)

v. McCormick, 5 IBLA 382, 79 I.D. 155 (1972), involving a mine in Arizona, 5/ the Board cited Lichty v. Lewis, 77 F. 111 (9th Cir. 1896), and ruled that where the Government contests an unpatented mining claim held as community property, it is essential that only the husband need be named in the notice of contest and complaint. 6/

The law of New Mexico is in accord with this principle. The right and duty of the husband to represent the community in litigation is embraced by the husband's "management and control" of community property. Section 57-4-3 of New Mexico Statutes Annotated (1953) provides:

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fn. 4 cont.
by a married woman by an instrument in writing the presumption is that title is thereby vested in her as her separate property. And if acquired by such married woman and any other person the presumption is that she takes the part acquired by her as a tenant in common, unless a different intention is expressed in the instrument; except, that when any such real or personal property is acquired by husband and wife, by an instrument in writing in which they are described as husband and wife, unless a different intention is expressed in the instrument, the presumption is that such property is community property of said husband and wife. The presumptions in this section mentioned, are conclusive in favor of any person dealing in good faith and for valuable consideration with such married woman or her legal representatives or successor in interest and regardless of any change in her marital status after acquisition of said property." (Emphasis added.)

Accordingly, under the law of New Mexico, the interest is presumed to be community property. United States Fidelity & Guaranty Co. v. Chavez, 126 F. Supp. 227 (1954). See 25 SOUTHERN CALIFORNIA L. REV. 149, 164-167 (1952).

5/ 11 Ariz. Rev. Stats. Anno. § 33-452 (1956) provides:

"A conveyance or incumbrance of community property is not valid unless executed and acknowledged by both husband and wife, except unpatented mining claims which may be conveyed or incumbered by the spouse having the title or right of possession without the other spouse joining in the conveyance or incumbrance."

6/ In oil and gas leases the Department has held that a husband and wife may each hold, in his or her own right, the maximum acreage authorized for an individual or association in any one state, regardless of state laws pertaining to property rights of husband and wives. Duncan Miller, 71 I.D. 121, 122 (1964). The United States District Court for the District of Columbia sustained the Department's decision as to that issue in McIntosh v. Udall, Civil Action No. 1522-64 (June 29, 1965).

Management of community property vests in husband -- Joinder in deeds and mortgages -- Conveyance of separate property without joinder -- Separate conveyances of community real property void -- Exception. -- The husband has the management and control of the personal property of the community, and during coverture the husband shall have the sole power of disposition of the personal property of the community, other than testamentary, as he has of his separate estate; but the husband and wife must join in all deeds and mortgages affecting real estate * * *.

The statute was construed in Fidel v. Venner, 35 N.M. 45, 289 P. 803, 804 (1930), as follows:

Appellants contend, first, that the effect of the statute is to deny to the husband the right to manage the real estate of the community or to act as agent in regard to it. The argument is that, since the prior statute, section 16, c. 37, Laws 1907 (section 2766, Code 1915), gave the husband the management of both the real and personal property of the community, the subsequent enactment served to curtail the power of management by confining it to the personal property of the community. But both statutes must be construed in the light of the historical background which surrounds the community property system. It was unknown to the common law, but comes to us from the civil law of Mexico and Spain. Before his power was curtailed by statute, the husband enjoyed the control and management of both real and personal property of the community and had the power of alienation without the wife's joinder. Section 16, c. 37, Laws of 1907, in so far as it affirms the power of the husband to manage and control the community property both real and personal, is declaratory of the pre-existing law. And chapter 84, Laws 1915, is also a recognition of the power of the husband over the personal property of the spouses, coupled with a restriction against sale or mortgaging of real estate without the wife's joining. There is nothing in the act itself which in terms forbids the husband to manage and control the realty of the community, except in the twoinstances mentioned. It would indeed be an anomalous situation if the community, composed of husband and wife, could

> have no head or agent in the transaction of business. Whatever inroads may have been made by modern ideas upon the time-honored position of the husband as lord and master of the family, the law still regards him as the head of the community and provides for his removal and the substitution of the wife under certain circumstances, Comp. 1929 § 68-404. He alone has power to bind the community for debt. Morris v. Waring, 22 N.M. 175, 159 P. 1002. Title taken in his name is presumptively community title. The converse is true of the wife. Comp. 1929, § 68-401. We do not believe that by restricting the husband's power to execute a deed or mortgage without the wife's joining it was the intention of the Legislature to take from him the right and power to manage and control the real estate of the community in all other respects. Baca v. Belen, 30 N.M. 541, 240 P. 803.

In Levy v. Kalabich, 35 N.M. 282, 295 P. 296, 297-98 (1931), the Supreme Court of New Mexico held that a wife is not a necessary party defendant in a suit against a husband to enforce a mechanic's lien on community real property:

> The jurisprudence which Kearney found in New Mexico did not, so far as we are aware, contemplate the wife as a necessary or proper party to litigation involving the community property. The adoption of the common law in 1876 did not abolish the community system. When, in 1907 (chapter 37, § 16), we reduced the matter to Code, and prescribed "the husband has the management and control of the community property, with the like absolute power of disposition, other than testamentary, as he has of his separate estate, * * *" we did not initiate that "management and control." We declared an historic condition. When we changed it in 1915, we disturbed it only with respect to the execution of deeds and mortgages. Fidel v. Venner, supra. The point here made is that, as the wife was not originally a necessary party, and as legislation has not made her such, she is not now a necessary party.
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> In Reade v. Lea, 14 N.M. 442, 95 P. 131, 133, the territorial Supreme Court said, upon authorities cited: "In all suits affecting the community property the wife

> is not a party, but such suits must be brought by the husband * * * or against him. * * * If the community property be stolen, the indictment alleges that he is the owner * * *; and his wife's consent to the taking of the property affords the thief no defense." These rules of practice were not challenged by the late Justice Abbott, who dissented in that case, by Mr. Justice Holmes, who wrote the reversing opinion for the Supreme Court of the United States, Arnett v. Reade, 220 U.S. 311 * * *, nor by former Justice Roberts in Beals v. Ares, supra. They were not involved in the holdings that the nature of the wife's interest is something more than expectancy, that it is not inferior to that of the husband who controls and manages it, and that it is to the common law, not the civil, that we are to look to determine a right not prescribed by statute. These holdings were not arrived at by overturning those rules of practice, but notwithstanding them. They state the law as it existed in 1908. No statute or decision has changed them.
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> In Beals v. Ares, supra, this court declared: "This act was modeled after the civil law of Spain and Mexico, and necessarily we would look to that law for definitions and interpretations, just as we would look to the decisions of the courts of a sister state for the construction and interpretation of statutes taken from such state." What we here seek is the meaning and extent of the statutory "management and control." It is not a technical common-law term. Had the statute declared the husband the "agent" of the community, we might well search the common law to ascertain what rights and duties were implied. But as we have heretofore ventured to say, the Legislature was merely declaring established law. The husband's "management and control" of community property was historic in the civil law, but a stranger to the common law. Interpreting the expression as the above-quoted passage directs, we find that the husband's "management and control" embraces the right and duty to represent the community in its litigation.

Accord, Herrera v. Town of Atrisco, 76 N.M. 81, 412 P.2d 253, 254 (1966), as to an interest in a mining lease:

> In its appeal, defendant still asserts that the cause should have been dismissed because the parties sought to be joined were indispensable. We must agree

> with plaintiff insofar as Aurelia G. Herrera, wife of plaintiff, is concerned. We had thought that this question had long since been settled by what was said in Levy v. Kalabich * * *.

Appellant herein has shown no prejudice from failure to join her husband. The determination of invalidity in Contest No. 141 effectively terminated Judge Blythe's interest in the Cougar, and also terminated any community property interest of the appellant just as if she had expressly been made a party to the contest.

Under the doctrine of administrative finality, the decision in Contest No. 141 as to lack of discovery is final against appellant. In Eldon L. Smith, 6 IBLA 310, 312 (1972), the Board stated:

> In the absence of compelling legal or equitable reasons for reconsideration, the principle of res judicata will operate to bar consideration of a new appeal arising from a later proceeding involving the same party, the same land, the same claim and the same issues. Eldon L. Smith, 5 IBLA 330, 79 I.D. [149] (1972). The Dredge Corporation, 3 IBLA 98 (1971); Gabbs Exploration Co., 67 I.D. 160 (1960); aff'd Gabbs Exploration Co. v. Udall, 315 F.2d 37 (D.C. Cir. 1963), cert. den. 375 U.S. 822 (1963).

For this reason it is not necessary to consider those arguments of appellant which involve the validity of the claim and allegations of error in the conduct of the hearing. It is unfortunate that McCormick, supra, was not before the Board prior to the time when Contest No. 244 was brought; however, if there had been any defect in Contest 141 it was cured by Contest 244. The Department has been more than protective of the interest of appellant and her husband.

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decision appealed from is affirmed.

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Joseph W. Goss
Administrative Judge

We concur:

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Frederick Fishman
Administrative Judge

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Edward W. Stuebing
Administrative Judge